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No. 87-1898

In the Supreme Court of the United States

OCTOBER TERM, 1988

LARRY W. BRYANT, PETITIONER

v.

FRANK C. CARLUCCI, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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13 pp

TABLE OF AUTHORITIES

Cases:	Page
Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967)	4
Bivens v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)	3
Block v. *Community Nutrition Inst.*, 467 U.S. 340 (1984)	4, 5
Borrell v. *United States Int'l Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982)	9
Brown v. *GSA*, 425 U.S. 820 (1976)	6
Bush v. *Lucas*, 462 U.S. 367 (1983)	6, 8
Cutts v. *Fowler*, 692 F.2d 138 (D.C. Cir. 1982)	9
Data Processing Serv. v. *Camp*, 397 U.S. 150 (1970)	5
Egger v. *Phillips*, 710 F.2d 292 (7th Cir.), cert. denied, 464 U.S. 918 (1983)	4
Hubbard v. *Environmental Protections Agency*, 809 F.2d 1 (D.C. Cir. 1986)	9
Johnson v. *Robison*, 415 U.S. 361 (1974)	5
Kotarski v. *Cooper*, 799 F.2d 1342 (9th Cir. 1986), vacated, No. 86-1813 (June 27, 1988)	8
McIntosh v. *Weinberger*, 810 F.2d 1411 (8th Cir. 1987), vacated, No. 87-174 (June 27, 1988)	8
Pinar v. *Dole*, 747 F.2d 899 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985)	3, 7, 9
Schweiker v. *Chilicky*, No. 86-1781 (June 24, 1988)	4
Spagnola v. *Mathis*, 809 F.2d 16 (D.C. Cir. 1986)	9
United States v. *Fausto*, No. 86-595 (Jan. 25, 1988)	4, 5
Webster v. *Doe*, No. 86-1294 (June 15, 1988)	4
Williams v. *IRS*, 745 F.2d 702 (D.C. Cir. 1984)	9

Statutes and regulations:

Civil Service Reform Act of 1978:	
5 U.S.C. 1206	2
5 U.S.C. 1302	2
5 U.S.C. 2103(a)	4
5 U.S.C. 2302	2
5 U.S.C. 2302(a)(2)(C)	6
5 U.S.C. 2302(b)(8)	6
5 U.S.C. 4301 *et seq.*	6
5 U.S.C. 4303(b)	6
5 U.S.C. 4303(e)	6-7

Statutes and regulations – Continued: Page

5 U.S.C. 7501 *et seq.* 7
5 U.S.C. 7511-7513 4
5 U.S.C. 7512 7
5 U.S.C. 7703 ..... 4, 7
National Security Act of 1947, § 102(c), 50 U.S.C. 403(c) 5
28 U.S.C. 1331 3
5 C.F.R.:
Section 213.3201 4
Section 771.205 2
Section 771.206(a) 6

Miscellaneous:

S. Rep. 95-969, 95th Cong., 2d Sess. (1978) 5

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Petitioner, a federal employee who sought equitable relief against alleged retaliation by his superiors for his exercise of First Amendment rights, claims that the courts below erred in holding that he is limited to the remedies provided by the Civil Service Reform Act of 1978 (CSRA).

1. Petitioner, a GS-11 civilian employee of the Army News Service, is also the director of a group called Citizens Against UFO Secrecy, which believes that the government is suppressing information about unidentified flying objects (UFOs). In 1983, petitioner filed a "Petition for Writ of Habeas Corpus Extraterrestrial," in which, by his account, he asked a district court "to order the Air Force to produce, for the Court's disposition, the bodies of all crew members retrieved from crash-landed 'flying saucers' during the past three decades" (C.A. App. 36). After that petition was dismissed, he placed advertisements in newspapers reaching members of the armed forces, seeking information to support his contentions. For example, one

advertisement (appended to the consent judgment reprinted at Pet. App. 15a-17a) asked service members who were "stationed at Homestead AFB back in the seventies, when Richard M. Nixon allegedly allowed entertainer Jackie Gleason to view a repository of UFO artifacts (including some of their alien occupants)," to "[h]elp us find and reveal the truth" (Exh. A).

Petitioner claims that, after he publicized his concerns, his performance ratings generally declined from "exceptional" to "satisfactory" and that, in retaliation for his actions, his supervisors have given him less responsibility (Pet. 4-5). Petitioner has not, however, been demoted, suspended, or subjected to any other adverse personnel action.

Invoking his remedies under the CSRA, petitioner filed a prohibited personnel practice claim with the Office of Special Counsel of the Merit Systems Protection Board (MSPB) (see 5 U.S.C. 1206). The Special Counsel found no basis for concluding that a prohibited personnel practice (see 5 U.S.C. 2302) had occurred (Pet. App. 6a, 9a; Pet. 13 n.11). Petitioner subsequently filed a grievance, focusing on an "unsatisfactory" performance rating he received in early 1986.[1] A representative of the United States Army Civilian Appellate Review Agency, an independent organization that investigates grievances, held a meeting at which petitioner (who chose not to be represented by counsel) presented evidence and questioned witnesses (C.A. App. 17-18). The investigator concluded that the

[1] Under authority granted to it in the CSRA (5 U.S.C. 1302), the Office of Personnel Management (OPM) requires federal agencies, including the military, to establish grievance systems in which employees may raise "any matter of concern or dissatisfaction relating to the employment of an employee which is subject to the control of agency management" (5 C.F.R. 771.205).

"unsatisfactory" performance rating was accurate and was not given in reprisal for petitioner's UFO activities (*id.* at 19).

Petitioner thereupon sued the Secretaries of Defense, the Army, and the Air Force in the United States District Court for the Eastern District of Virginia, invoking jurisdiction under 28 U.S.C. 1331. Alleging that his First Amendment rights had been violated, petitioner sought equitable relief, but did not seek damages under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court granted the defendants' motion to dismiss on the authority of *Pinar* v. *Dole*, 747 F.2d 899 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985). In that case the Fourth Circuit held that a federal employee alleging a violation of his constitutional rights, who had no right to judicial review under the CSRA because he had suffered only minor adverse actions (a reprimand, a two-day suspension, and termination of a temporary promotion), could not otherwise invoke a court's jurisdiction (Pet. App. 13a). The district court concluded that, under *Pinar*, it likewise had no jurisdiction over petitioner's claim.

The Fourth Circuit affirmed in an unpublished opinion (Pet. App. 1a-6a). Noting that it had concluded in *Pinar* "that judicial review of minor personnel actions 'would fly in the face of Congress' clear intent to distinguish between disciplinary actions according to the severity of the punishment imposed and provide for varying degrees of review based on the deprivation in question,'" the court stated that "to challenge personnel actions, [petitioner's] remedies are limited to those provided in the CSRA" (*id.* at 6a).

2. The courts below correctly dismissed petitioner's suit. Although there is presently a conflict between the Fourth Circuit and the District of Columbia Circuit on the

question whether federal employees may bring suit in federal district court challenging personnel decisions on constitutional grounds other than through the procedures set forth in the CSRA, review of that question is not warranted at this time. The Court has recently decided a number of cases bearing on the rights of federal employees suffering adverse personnel actions—*United States* v. *Fausto,* No. 86-595 (Jan. 25, 1988), *Schweiker* v. *Chilicky,* No. 86-1781 (June 24, 1988), and *Webster* v. *Doe,* No. 86-1294 (June 15, 1988)—and the courts of appeals should reconsider what sorts of claims federal employees may bring in light of those cases before this Court considers the matter.

a. The Court held in *Fausto* that "the comprehensive nature of the CSRA" (slip op. 8) compelled the conclusion that a federal employee, who did not allege a constitutional violation, could not challenge a 30-day suspension by bringing suit under the Tucker Act in the Claims Court. The Court reached that conclusion even though the employee, a member of the "excepted service" (see 5 U.S.C. 2103(a) and 5 C.F.R. 213.3201), had no right to judicial review of the suspension under the CSRA, unlike non-probationary employees in the competitive service (see 5 U.S.C. 7511-7513, 7703).[2] Applying the test of *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140 (1967), the Court found that " 'the presumption favoring judicial review . . . [has been] overcome by inferences of intent drawn from the statutory scheme as a whole.' " *Fausto,* slip op. 13 (quoting *Block* v. *Community Nutrition Inst.,* 467 U.S. 340, 349 (1984)). In reaching that conclusion, the Court noted that Congress intended the CSRA to replace

[2] Moreover, the employee would have had a right to review under the Tucker Act prior to the enactment of the CSRA and the CSRA did not expressly repeal that cause of action (*Fausto,* slip op. 12-15).

the " 'outdated patchwork of statutes and rules built up over almost a century' " (*id.* at 4, quoting S. Rep. 95-969, 95th Cong., 2d Sess. 3 (1978)). The Court particularly relied on the fact that it would turn the scheme of the CSRA "upside down" to allow excepted service employees to challenge suspensions directly in the Claims Court, while competitive service employees, who are generally given greater rights under the CSRA, would have to go to the MSPB before obtaining limited judicial review in the Federal Circuit (slip op. 10).

Fausto lends support to the Fourth Circuit's position that employees challenging personnel actions on constitutional grounds must proceed under the CSRA or not at all. The test applied in *Fausto* in concluding that " 'congressional intent to preclude review is "fairly discernible in the statutory scheme" ' " (slip op. 12-13, quoting *Block* v. *Community Nutrition Inst.*, 467 U.S. at 351, quoting *Data Processing Serv.* v. *Camp*, 397 U.S. 150, 157 (1970)), derived from *Abbott Laboratories*, and is the same test that this Court has applied in analyzing whether review of constitutional claims has been precluded. See *Johnson* v. *Robison*, 415 U.S. 361, 373-374 (1974).

To be sure, in *Webster* v. *Doe* the Court concluded that a constitutional claim based on the discharge of an employee of the Central Intelligence Agency (CIA) was subject to review by a district court (slip op. 10), even though Congress had plainly indicated in Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c), that it did not intend to allow review of discharges. For two reasons, however, this Court's decision in *Webster* v. *Doe* does not mean that the district court must hold a trial to consider whether petitioner's performance ratings were lowered in retaliation for his publication of his belief that the government is suppressing information about UFOs. First, unlike the CIA employee in *Webster* v. *Doe*, petitioner has specific remedies available to him under the CSRA, which

he in fact invoked. Indeed, the prohibited personnel practice provisions were established in part so that the Special Counsel could protect whistleblowers, which is what petitioner supposes he is, from retaliation (see 5 U.S.C. 2302(b)(8)). CIA employees, in contrast, may not complain to the Special Counsel, because the CIA is specifically exempted from the prohibited personnel practice provisions by 5 U.S.C. 2302(a)(2)(C). Nor can such employees file grievances under the procedures established by OPM (see note 1, *supra*), since the CIA is specifically exempted from OPM's grievance regulations by 5 C.F.R. 771.206(a).[3] The fact that Congress provided appropriate remedies for petitioner under the CSRA supports the conclusion that it intended that he not be allowed to pursue others. Cf. *Bush* v. *Lucas*, 462 U.S. 367 (1983); *Brown* v. *GSA*, 425 U.S. 820, 834-835 (1976).

Second, the employee in *Webster* v. *Doe* was discharged, whereas petitioner primarily complains that his performance ratings have declined. The scheme of the CSRA shows that Congress did not intend to authorize judicial review of such minor matters. Under the performance appraisal system set forth in Chapter 43 of Title 5, 5 U.S.C. 4301 *et seq.*, which was established by the CSRA, employees who are proposed to be demoted or removed on account of unacceptable performance ratings have certain procedural rights (5 U.S.C. 4303(b)), and competitive service employees who are demoted or removed may challenge the adverse action in the MSPB (5

[3] We argued in passing in *Webster* v. *Doe* (see Pet. Br. at 12-13 n.9) that CIA employees were limited to their remedies under the CSRA. The Court did not address that argument.

U.S.C. 4303(e)), with review in the Federal Circuit (5 U.S.C. 7703). Employees like petitioner, however, who have not been either demoted or removed, are entitled only to file a grievance and complain to the MSPB's Office of Special Counsel about a prohibited personnel practice, as the court below recognized (Pet. App. 5a).[4] Thus, the scheme of the CSRA, under which the procedures available to an employee depend on the severity of the action taken against him, makes clear that Congress did not intend to authorize review of minor complaints such as a decline in performance ratings. Indeed, it would turn the CSRA "upside down" (*Fausto*, slip op. 10) to allow petitioner to go directly to court to challenge his performance ratings, while employees who have been demoted or removed on account of unacceptable performance ratings must complain to the MSPB, with limited review in the Federal Circuit.

Moreover, the scheme of the CSRA, under which judicial review is available only in cases involving serious adverse actions, is plainly sensible. The approach petitioner advocates, in contrast, would require judicial review of any personnel matter where an employee can frame his complaint in constitutional terms. As this case illustrates, "even the most minor of disciplinary actions can be alleged to have been taken in retaliation for something an employee once said" (*Pinar*, 747 F.2d at 911). But there is no good reason why courts should "become involved in the most rudimentary of personnel matters"; to the con-

[4] The provisions governing adverse actions not based on unacceptable performance ratings, which are in Chapter 75 of Title 5, 5 U.S.C. 7501 *et seq.*, like the provisions of Chapter 43, distinguish between the remedies available in adverse action cases based on the severity of the action. Judicial review is available only in cases of "major" adverse actions, which are defined as removals, suspensions for more than 14 days, reductions in grade or pay, and furloughs (5 U.S.C. 7512).

trary, permitting judicial review whenever an employee alleges a constitutional deprivation would "inhibit supervisors from taking even the most minor disciplinary actions for fear of having to justify their actions in federal court" (*ibid.*).

b. As petitioner states (Pet. 8-9), there is a conflict in the circuits on the question presented. The conflict, however, is much more limited than petitioner suggests. Two of the decisions petitioner cites as conflicting with the decision below—*McIntosh* v. *Weinberger*, 810 F.2d 1411 (8th Cir. 1987), vacated, No. 87-174 (June 27, 1988), and *Kotarski* v. *Cooper*, 799 F.2d 1342 (9th Cir. 1986), vacated, No. 86-1813 (June 27, 1988)—are not squarely on point because they are *Bivens* cases.[5] As petitioner recognizes (see Pet. 8-9 n.7), the question whether equitable relief is available to remedy an alleged constitutional violation is not the same as the question whether a damage remedy against individual government employees should be created under *Bivens*. Moreover, this Court recently vacated *McIntosh* and *Kotarski* and remanded for reconsideration in light of *Schweiker* v. *Chilicky*.[6] The only

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[5] Although this Court declined to recognize a *Bivens* remedy for federal employees in *Bush* v. *Lucas*, 462 U.S. at 388, citing the "elaborate remedial scheme" constructed by Congress to consider employees' claims, the courts in *Kotarski* and *McIntosh* distinguished *Bush* v. *Lucas* because the plaintiffs in those cases had more limited rights under the CSRA. *McIntosh*, 810 F.2d at 1435; *Kotarski*, 799 F.2d at 1346.

[6] The Court in *Schweiker* v. *Chilicky* declined to create a *Bivens* remedy for allegedly unconstitutional deprivations of disability benefits. Reading the decision in *Fausto*, where the Court stressed the comprehensive nature of the CSRA, together with the decision in *Schweiker* v. *Chilicky*, where the Court held that a *Bivens* remedy is not appropriate "[w]hen the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violation that may occur in the course of its

other case petitioner cites from outside the District of Columbia Circuit, *Egger* v. *Phillips*, 710 F.2d 292 (7th Cir.), cert. denied, 464 U.S. 918 (1983), is also a *Bivens* case.[7]

The decisions of the Fourth Circuit and the District of Columbia Circuit do conflict, however. The Fourth Circuit has concluded that personnel decisions, including those allegedly made in violation of the Constitution, may be challenged only as provided in the CSRA, while the District of Columbia Circuit has held that an employee without a judicial remedy under the CSRA may obtain review of a constitutional claim under other statutes.[8]

In light of the decision to remand *McIntosh* and *Kotarski* for further proceedings, it seems clear that the Court has decided that the *Bivens* issue does not warrant review at this time. The question presented here is somewhat

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administration" (slip op. 10), we would submit that no *Bivens* remedy should be created authorizing damages for unconstitutional federal personnel actions.

[7] The District of Columbia Circuit is presently considering en banc whether federal employees with limited rights under the CSRA may bring *Bivens* actions, in order to resolve its conflicting decisions on that question in *Hubbard* v. *Environmental Protections Agency*, 809 F.2d 1 (1986), and *Spagnola* v. *Mathis*, 809 F.2d 16 (1986). See 809 F.2d at 40-41.

[8] The decisions of the Fourth Circuit and the District of Columbia Circuit differ somewhat in that petitioner and the employee in *Pinar* alleged minor injuries, and the court here (Pet. App. 6a) and the court in *Pinar* relied on that fact (747 F.2d at 911). Most of the employees in the cases in the District of Columbia Circuit, in contrast, suffered more severe injuries. The employee in *Hubbard* was denied employment; the employee in *Spagnola* was denied a promotion; the employee in *Williams* v. *IRS*, 745 F.2d 702 (D.C. Cir. 1984), was suspended for five days; the employee in *Cutts* v. *Fowler*, 692 F.2d 138 (D.C. Cir. 1982), was transferred; and the employee in *Borrell* v. *United States Int'l Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982), was discharged.

different in that petitioner alleges a constitutional violation but does not seek a *Bivens* remedy. Nevertheless, we think that review of the question presented here is not warranted at this time either. Although it remains our position that the Fourth Circuit has correctly concluded that Congress can preclude review of personnel decisions and has done so with respect to cases like this one, the courts of appeals should be allowed to analyze these cases under the standards of *Fausto, Schweiker* v. *Chilicky,* and *Webster* v. *Doe* before this Court again addresses the rights of federal employees challenging personnel decisions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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